

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Andrew David Wagner,
individually and d/b/a Creative Construction

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on before Administrative Law Judge Kathleen D. Sheehy for a prehearing conference at 1:30 p.m. on November 30, 2007, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, MN 55101. The OAH record closed at the conclusion of the prehearing conference.

Michael J. Tostengard, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared on behalf of the Department of Labor and Industry (the Department).

Andrew David Wagner d/b/a Creative Construction (Respondent), 213 Dayton Road, Champlin, MN 55316, did not appear.

STATEMENT OF ISSUES

The issue presented in this case is whether the Respondent is subject to discipline and/or civil penalties because:

(1) The Respondent performed residential building contractor or roofing services without being licensed, in violation of Minn. Stat. § 326.84, subds. 1 and 1b, and 326.842 (2006);

(2) The Respondent failed to comply with the terms of a cease and desist order, in violation of Minn. Stat. § 326.91, subd. 1(5) (2006);

(3) The Respondent represented to a homeowner that he was licensed when he was not, thereby engaging in a fraudulent, deceptive, and dishonest practice in the procurement of a contract, in violation of Minn. Stat. § 326.91, subds. 1(2) and 4 (2006), and Minn. R. 2891.0040, subp. 1C (2005); and

(4) Respondent performed roofing work for a homeowner in Circle Pines, Minnesota, in an unworkmanlike manner and refused to repair the faulty work despite repeated requests, thereby performing negligently or in breach of contract, in violation of Minn. Stat. § 326.91, subd. 1(4) and 4 (2006).

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On October 26, 2007, the Commissioner sent by first class mail a copy of the Notice and Order for Hearing, Order for Prehearing Conference, and Statement of Charges (Notice and Order for Hearing) to the Respondent at 213 Dayton Road, Champlin, MN 55316.¹

2. The Notice and Order for Hearing scheduled a prehearing conference in this matter at 1:30 p.m. on November 30, 2007, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota.

3. The Notice and Order for Hearing specifically notified the Respondent that failure to appear at the prehearing conference may result in a finding that Respondent is in default, that the Department's allegations contained in the Statement of Charges may be accepted as true, and that the Respondent may be subject to discipline, including revocation, suspension, censure, or the imposition of civil penalties.²

4. The Respondent did not appear for the prehearing conference, nor did Respondent contact the Administrative Law Judge prior to the prehearing conference to seek a continuance or request any other relief.

5. Because Respondent failed to appear for the prehearing conference, he is in default.

6. Pursuant to Minn. R. 1400.6000 (2005), the allegations contained in the Notice and Order for Hearing are taken as true and incorporated by reference into these Findings of Fact.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50, 326.91, and 326.92, subd. 3.

2. Respondent received due, proper and timely notice of the charges against him and of the time and place of the prehearing conference. This matter

¹ Affidavit of Service by U.S. Mail (Oct. 26, 2007).

² Notice and Order for Hearing at 4.

is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

4. Under Minn. R. 1400.6000, a contested case may be decided adversely to a party who defaults. On default, the allegations set out in the Notice and Order for Hearing or other pleadings may be taken as true or deemed proved without further evidence.

5. The Respondent is in default as a result of his failure to appear at the prehearing conference.

6. Residential building contractors must be licensed by the Commissioner.³ Residential roofers are subject to this requirement.⁴

7. The Respondent performed residential building contractor or roofing services without being licensed, in violation of Minn. Stat. § 326.84, subds. 1 and 1b, and 326.842 (2006).

8. The Respondent failed to comply with the terms of a cease and desist order dated August 6, 2007. The Respondent thereby failed to comply with any rule or order of the Commissioner under sections 326.83 to 326.98, or any other law, rule, or order related to the duties and responsibilities entrusted to the Commissioner, in violation of Minn. Stat. § 326.91, subd. 1(5) (2006).⁵

9. The Respondent represented to a homeowner that he was licensed when he was not. The Respondent thereby engaged in a fraudulent, deceptive, and dishonest practice in the procurement of a contract, in violation of Minn. Stat. § 326.91, subd. 1(2) (2006), and Minn. R. 2891.0040, subp. 1C (2005).

10. Respondent performed roofing work in an unworkmanlike manner and refused to repair the faulty work despite repeated requests. The Respondent thereby performed negligently or in breach of contract, in violation of Minn. Stat. § 326.91, subd. 1(4) (2006).

11. Disciplinary action against the Respondent is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

³ Minn. Stat. § 326.84, subds. 1 and 1b (2006).

⁴ Minn. Stat. § 326.842 (2006).

⁵ Minn. Stat. § 326.91, subd. 1(5) (2006).

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner take disciplinary action against the Respondent.

Dated: December 4, 2007

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Default

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least ten (10) days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Steve Sviggum, Commissioner, Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155, or call the Department at (651) 284-5005, to learn about the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record close